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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 418

MARCEL F. LaBRANCHE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BENTLEY G. BYRNES,
Counsel for Petitioner.

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MARCEL F. LaBRANCHE,

Petitioner,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Marcel F. LaBranche, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above cause on July 18, 1949, affirming the judgment of the United States District Court for the Eastern District of Louisiana, New Orleans Division, of May 24, 1948.

Opinions Below

The trial court filed no opinion. The opinion of the court of appeals (R. 2191) is reported in 175 F. 2d 960. The dissenting opinion of Circuit Judge Hutcheson on motion for rehearing (R. 2273) is not yet officially reported.

Jurisdiction

The judgment of the Court of Appeals sought to be reviewed was entered on July 18, 1949 (R. 2200). After obtaining an extension of time, until August 22, 1949, (R. 2200) petitioner filed a petition for rehearing which was denied on September 23rd, 1949 (R. 2278). The jurisdiction of this Court is invoked under Title 28, U. S. C. Sec. 1254(1). See also Rule 37(b) of the Federal Rules of Criminal Procedure, promulgated by the Court February 8, 1946.

Questions Presented

1. Whether under the Criminal Code, Section 37, a charge of conspiracy will lie where the indictment charges and the Government's proof purports to show nothing other than that accused's sole connection with or knowledge of any phase of the offense was that he agreed to receive a bribe for his favorable vote as a petit juror and did actually consummate the offense of receiving a bribe by actually receiving it, there being no ingredient in the conspiracy alleged and moved which was not present in the completed offense of receiving a bribe.

2. Whether an indictment, in one count, under Section 37 of the Criminal Code, which charges a conspiracy to commit offenses against the United States and to defraud the United States must be dismissed as duplicitous in that it charges two crimes: (1) a conspiracy to commit offenses against the United States, and (2) a conspiracy to defraud the United States.

3. Whether it was reversible error for the trial court to deny to petitioner, upon his trial for conspiring to receive a bribe for his favorable vote as a petit juror, the right to cross-examine a government witness who had testified that petitioner voted "not guilty" throughout the

jury's deliberations, and to show by such cross-examination that seven other members of the jury had voted as did petitioner, thus depriving him of his right to confront witnesses against him as guaranteed by the Sixth Amendment.

4. Whether the court below erred when it denied defendant the right to offer and file in evidence a sworn statement by a Government witness and transcripts of the proceedings before the grand jury showing the testimony of the prosecution witness contradictory to his trial testimony and showing as objective circumstances threats of prosecution for perjury and penalties under the income tax law supplying a motive for the changing of his testimony before the grand jury exculpating petitioner to that given at the trial.

5. Whether under the circumstances peculiar to this case the trial court coerced the jury into reaching a verdict by giving the so-called *Allen* case instruction after 25 hours of deliberation by the jury and then holding the jury for an additional 48 hours without further instruction or appearance in court.

Statutes Involved

U. S. Const. 6th Amendment;
Criminal Code Sec. 37, U. S. C. Title 18, Sec. 88 (1946);
Criminal Code Sec. 135, U. S. C. Title 18, Sec. 241 (1940);
Criminal Code Sec. 136, U. S. C. Title 18, Sec. 242 (1940);
U. S. C. Title 18, Sec. 556 (1946);
U. S. C. Title 18, Sec. 557 (1946);
U. S. C. Title 28, Sec. 391 (1946).

These are set out in the Appendix, pp. 32-34.

Statement

On January 3, 1946, your petitioner Marcel F. LaBranche, William T. Burton, James Noe and Joseph T. Cawthorn were indicted for having conspired to endeavor to obstruct the due administration of justice in a criminal prosecution brought by the United States against William T. Burton; for having conspired to obstruct the due administration of justice in that proceeding; and for having conspired to defraud the United States of its governmental function of considering and deciding that case through the petit jury, free from improper influence and fraud. Edwin H. Oliveira, Bernard R. Hughes, and John J. Astorias were named as co-conspirators but were not indicted (R. 3-11).

The evidence introduced at the trial attempted to show four attempts by the alleged conspirators to improperly influence the jury. Your petitioner was not related to the first three incidents in any manner, but was alleged to have accepted a bribe from his co-conspirators while acting as a member of the jury considering the case of the *United States* v. *William T. Burton.* The defendant Noe was acquitted, but your petitioner was given a sentence of two years imprisonment and fined $10,000 (R. 2165).

The only evidence offered by the government which in any way related to petitioner was as follows:

Petitioner and the alleged co-conspirator, Oliveira, were drawn on the jury panel for the May-June 1945 Term of the District Court (R. 557-559), petitioner being drawn and accepted as a juror in the case charging income tax evasion against defendant William T. Burton, which trial commenced on the morning of June 4, 1945 (R. 559). Oliveira was called but was challenged by the Government (R. 559). According to Oliveira, a self-confessed race horse tout (R. 599, 1175), perjurer (R. 595), and "jury-fixer"

(R. 559, 561, 563, 566), a few minutes before the Burton income tax trial commenced, he met petitioner LaBranche, whom he already knew, in the corridor of the Court House (R. 558), and they agreed that if either should be taken on the jury they would ("split") divide whatever they might be able to obtain for their vote and that he, Oliveira, would do the contacting (R. 559); that he, Oliveira, contacted defendant, Cawthorn, on the second day of the trial (R. 561) and Cawthorn agreed to pay petitioner, through Oliveira, $1500.00 for his favorable vote on the jury (R. 563, 566); that Oliveira conveyed this arrangement to petitioner (R. 563); and thereafter contacted Burton to confirm Cawthorn's agreement (R. 568); that he, Oliveira, saw Burton after the end of the trial and was told to go see Astorias, another unindicted alleged co-conspirator, who would deliver the money (R. 569-70); that Oliveira did go to see Astorias but he failed to get the money (R. 571) and some weeks later petitioner went to see Astorias and did get the $1500.00, $500.00 of which he gave Oliveira (R. 573-4). The alleged co-conspirator, Astorias, whom the Government investigators had found with $19,000.00, on which he had not paid income taxes, in a safety deposit box (R. 658, 660, 661), out of which he had swindled his employers (R. 1305-1307), testified that the night after the income tax case ended (R. 647), Burton delivered a package to him and asked him to deliver it to a man with a mustache named LeBlanc or LaBranche (R. 649), who would call for it and, as a sort of "pass-word" would say "a package wrapped in a newspaper" (R. 650); that to a man, who looked something like petitioner, and called for the package saying it was "wrapped in a newspaper", he delivered that package, in which he saw one twenty dollar bill (R. 650, 677), but he refused to identify petitioner as the man to whom he delivered the package (R. 672, 673, 675). Both Burton

and Cawthorn emphatically denied that either had spoken to Oliveira at any time about the case, or ever knew him (R. 1175, 1176, 1381, 1383), and Burton emphatically denied that he had ever spoken to Astorias or ever knew him (R. 1386). There is no other word of testimony in the whole record that even remotely connects this petitioner with any part of this case.

As to the other three instances of jury tampering alleged in the indictment, one involved a conversation between the defendant Noe and jury member Dinghaus (R. 452-463). There was no evidence that Noe requested Dinghaus to act improperly. In the second, defendant Noe also contacted one Bernard R. Hughes, and Hughes in turn contacted Groffman, a venireman who was excused at the trial (R. 443). Due to Noe's acquittal these two incidents have now lost their significance.

In the third, according to a Government witness, Hughes P. Walmsley, defendants Noe and Cawthorn offered him a bribe to contact members of the panel (R. 466). His prior contradictory statements before the grand jury were introduced to impeach his testimony (R. 501, *et seq.*), and the defendants Noe and Cawthorn both testified that they had made no improper advances (R. 921 *et seq.*, 1168 *et seq.*). Thus, the jury was presented with a serious question of the credibility to be attached to the testimony of the various witnesses.

Following the presentation of the Government's evidence your petitioner moved for dismissal on ground that the evidence was insufficient as a matter of law to show he was a member of the conspiracy (R. 23, 706). This motion was overruled. On appeal the court of appeals filed an opinion affirming the convictions (R. 2191), and a motion for rehearing was denied (R. 2273), but Judge Hutcheson dissented from the denial of this motion on the ground that

"to permit the government, as was done here, to offer a witness and then to deny defendant reasonable cross-examination of that witness is contrary to common fairness as understood by every standard of American justice and due process of law" (R. 2277).

Specifications of Error to Be Urged

I

The Court of Appeals erred in holding:

That a charge of conspiracy, under Section 37, of the Criminal Code, can be maintained against this petitioner, where the indictment charges, and the Government proof purports to show, nothing other than that accused's only connection with or knowledge of any phase of the offense was that he agreed to receive a bribe for his favorable vote as a petit juror and did actually consummate the offense of receiving a bribe as such juror for his favorable vote by actually receiving the bribe, there being no ingredient in the conspiracy which was not present in the completed offense of receiving a bribe.

II

That the indictment was not duplicitous despite the fact that it charges, *in one count*, a conspiracy to commit offenses against the United States *and to* defraud the United States.

III

That it was not reversible error for the trial Court to deny to defendant, upon his trial for conspiring to receive a bribe for his favorable vote as a petit juror, the right (a) to cross-examine a Government witness who had testified in chief that defendant had voted "not guilty" throughout the jury's deliberations, and (b) to show by such cross-examination that seven other members of the jury had voted

as did defendant, thus approving the trial Court's depriving him of his right to confront the witnesses against him, as guaranteed by the Sixth Amendment.

IV

That it was not reversible error for the trial Court to deny petitioner's offer in evidence of the transcript of the minutes of the Grand Jury upon the appearance of an alleged co-conspirator, when it appears in said minutes that he there denied knowing petitioner, thus completely exculpating him, whereas, when testifying in behalf of the Government, on the trial of this case, the same co-conspirator gave highly incriminating testimony against petitioner.

V

That it was not reversible error under the circumstances peculiar to this case for the trial court to coerce the jury into reaching a verdict by giving it the so-called "Allen case instructions" after 25 hours of deliberation and by holding it in deliberation for more than 72 hours.

Reasons for Granting the Writ

The errors of law committed by the trial court and affirmed by the Fifth Circuit Court of Appeals, as set out in the specifications of error, were and are violative of the basic rights of petitioner and are in direct conflict with the jurisprudence of other United States Circuit Courts of Appeal and of the United States Supreme Court, as will be now pointed out.

I

Because the indictment charged, and the evidence showed, conspiracy merely to give and receive a bribe, and actual commission of the substantive offense, it should have been dismissed as to petitioner. It is evident that the Circuit Court of Appeals, in affirming the judgment of con-

viction of this petitioner, necessarily held, as set out in Specification of Error No. I, that a charge of conspiracy can be maintained against this petitioner under an indictment charging and on proof showing that his sole connection with or knowledge of any phase of the offense was his agreement to receive a bribe for his favorable vote as a petit juror and actually consummating the crime of receiving a bribe by actually having received the bribe for such vote, and necessarily held, that this petitioner can be convicted of a charge of conspiring with the other two defendants to commit the substantive offenses of agreeing to give a bribe to this petitioner and agreeing to receive a bribe by this petitioner, for his favorable vote as a petit juror, the substantive offenses having been consummated by this petitioner actually having received the bribe for such vote, there having been no ingredient in the conspiracy that was not present in the completed crime.

It is settled law that *where an offense such as a bribery necessarily involves concert of action of at least two persons, and they have in fact committed the crime, they may not be convicted of a conspiracy to commit it.*

> "WHERE CONCERT IS NECESSARY TO OFFENSE, CONSPIRACY DOES NOT LIE. When to the idea of an offense plurality of agents is logically necessary, conspiracy, which assumes the voluntary accession of a person to a crime of such a character that it is aggravated by a plurality of agents, cannot be maintained. As crimes to which concert is necessary (i.e., which cannot take place without concert), we may mention dueling, bigamy, incest, and adultery; to the last of which the limitation here expressed has been specifically applied by authoritative American courts. We have here the well-known distinction between concursus necessarius and concursus facultativus; in the latter of which the accession of a second agent the offense is an element added to its conception; in the former of which the participation of two agents is essential to its conception, and

> from this it follows that conspiracy, the gist of which is combination, added to crime, does not lie for concursus necessarius. In other words, when the law says, 'a combination between two persons to effect a particular end shall be called, if the end be effected, by a certain name,' it is not lawful for the prosecution to call it by some other name; and when the law says, such offense —e.g., adultery—shall have a certain punishment, it is not lawful for the prosecution to evade this limitation by indicting the offense as conspiracy. Of course when the offense is not consummated, and the conspiracy is one effectuate, this combination is of itself indictable. And hence, persons combining to induce others to commit bigamy, adultery, incest, or dueling, do not fall within this exception, and may be indicted for conspiracy." WHARTON'S CRIMINAL LAW, (12th Ed.) Vol. 2, Sec. 1604, page 1862.

The holding of the Fifth Circuit Court of Appeals in this case, as set out in Specification of Error No. I, conflicts with the holding of the Second Circuit Court of Appeals in *United States* v. *Zeuli*, 137 F. 2d 845, 846 (2d Cir. 1943), where Judge Learned Hand said:

> "Lower Federal courts have several times decided that, if a crime necessarily involves the mutual cooperation of two persons, and if they have in fact committed the crime, they may not be convicted of a conspiracy to commit it. *United States* v. *Dietrich*, C. C., 126 F. 664 (Van Devanter and Munger, J. J.); *United States* v. *New York Central & H. R. R. Co.*, 146 F. 298 (Holt D. J.); *United States* v. *Sager*, 2 Cir. 49 F. 2d, 725, 727, 728. Although the Supreme Court has never actually so decided, it has twice clearly approved the doctrine; and we accept it as settled law. *United States* v. *Katz*, 271 U. S. 354, 355, 46 S. Ct. 513, 70 L. Ed. 986; *Gebardi* v. *United States*, 287 U. S. 112, 122, 53 S. Ct. 35, 77 L. Ed. 206, 84 A. L. R. 370."

Since Judge Hand's decision in the *Zeuli* case, the Supreme Court has again clearly approved the doctrine. In

Pinkerton v. *United States,* 328 U. S. 640, 643 (1946) Mr. Justice Douglas states:

> "There are, of course, instances where a conspiracy charge may not be added to the substantive charge. One is where the agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime. See *United States* v. *Katz,* 271 U. S. 354, 355-356."

The holding of the Fifth Circuit Court in this case, as set out in Specification of Error No. I also conflicts with the holding of the Eighth Circuit Court, in the case of *United States* v. *Dietrich,* 126 Fed. 664, 667 (D. Neb. 1904), in which Judge Van Devanter said:

> "The agreement or transaction stated in this indictment was immediately and only between two persons, one charged with the intended taking and the other with the intended giving of the same bribe. Concert and plurality of agents in such an agreement or transaction are, in a sense, indispensable elements of the substantive offenses defined in section 1781, of agreeing to receive a bribe and of agreeing to give one. A person cannot agree with himself, receive from himself, or give to himself. The concurrent and several acts of two persons are necessary to the act of agreeing, receiving, or giving. In this respect, agreeing to receive a bribe from another and agreeing to give one are unlike soliciting or offering a bribe, because the solicitation or offer may be the act of a single person and may occur without any concurrent act of another. * * * Because concert and plurality of agents, in the sense we have hereinbefore shown, are essential to each of the offenses—there are two, not one—the commission of which is charged to have been the object of this so-called conspiracy, and because no other concert and plurality of agents are here charged, we are of opinion that the acts described in this indictment do not constitute a conspiracy under section 5440."

As said by the Court in *United States* v. *Burke*, 221 Fed. 1014, 1015 (S. D. N. Y. 1915):

> "It is well recognized, that, in a crime such as bribery, where the participation of at least two persons is necessary and concert of action is essential to the offense, an indictment will not lie charging a conspiracy to commit such offense."

A plurality of parties givers does not change the rule of the *Dietrich* case. As said by the Second Circuit Court in *United States* v. *Sager*, 49 F. 2d 725, 727:

> "There may not be a conspiracy founded on a crime to commit bribery between persons, one charged with the intended taking and several charged with giving the same bribe. Concert is always necessary to an agreement to take and to give a bribe; it is always necessary to an intended taking and an intended giving; and it is necessary to the receipt of a bribe and the giving of a bribe. United States v. Dietrich, 126 F. 664, 667; United States v. N. Y. Central R. R., 146 F. 298 * * *.
>
> "A plurality of parties givers does not change the rule of the Dietrich case. United States v. N. Y. Central R. R., supra.
>
> "It does not change the substantive offense of bribery that there be several givers and a single taker."

Whether the rule announced by Judge Hand in the *Zeuli* case and by Judge Van Devanter in the *Dietrich* case applies to the present case, depends upon the facts, not as alleged in the indictment, but as those allegations were modified or altered by the proof itself. The situation in this case, in this respect, is parallel to that in the *Zeuli* case. Here the Government contends, as it contended in the *Zeuli* case, that one general conspiracy (in which this petitioner joined) is charged, whereas, as will be seen from the allegations of the indictment, this petitioner was not alleged to have had knowledge

of or participated in any conspiracy, other than his own agreement to accept a bribe for his vote of "not guilty" and his actual receipt of the bribe.

In the *Zeuli* case, in discussing the Government's contention that Zeuli had joined the general conspiracy charged, Judge Hand said (137 F. 2d at p. 846):

> "The difficulty was not therefore in the indictment [which had charged a general conspiracy to steal ration books, while the evidence showed defendant was not connected with the original agreement to steal them] but in the proof, for the prosecution did not connect Zeuli with the preliminary theft * * *. The prosecution answers that, when a new confederate enters a conspiracy already in process of execution, he becomes a party to it as though he had been one of the original participants; and that, when Zeuli bought the books, knowing them to have been stolen, he became a conspirator with Steneck, Mignona and the rest, just as though he had been a confederate from the beginning. That might have been true, if, when Zeuli bought the books, he had been told of the scheme to steal and later to sell them, and had agreed to buy them in order to further that scheme. But that was not the situation; although he knew them to be stolen, he bought them without any purpose of securing to the thieves the fruits of their theft; the venture, so far as he was concerned, began, as it ended, with the purchase. United States v. Crimmins, 2 Cir., 123 F. 2d 271. His mere knowledge that they had been stolen made him even less a party to their theft than his knowledge of their future disposition—had that been criminal—would have made him a party to that disposition. United States v. Falcone, 311 U. S. 205, 61 S. Ct. 204, 85 L. Ed. 128; United States v. Peoni, 2 Cir., 100 F. 2d 401."

As has been shown, the only proof asserted even by the Government to show any connection of this petitioner with or knowledge of the facts, is that tending to show petitioner

agreed to receive and did actually receive a bribe for his vote of "not guilty."

The indictment does not charge and the proof does not show that Burton, Cawthorn and LaBranche conspired to give a bribe, nor does it charge or the proof show that Burton, Cawthorn and LaBranche agreed to receive a bribe. As the transaction is stated in the indictment and the Government's proof purports to show, it was LaBranche who agreed to receive and did receive the bribe, not LaBranche, Burton and Cawthorn, and it was Burton and Cawthorn who agreed to give the bribe and did give the bribe, not Burton, Cawthorn and LaBranche.

The indictment simply charges concert and plurality of agents between the intended taker of a bribe and the intended givers of the same bribe. Such concert and plurality of agents are essential elements of the substantive offenses of agreeing to give a bribe and of agreeing to receive a bribe. There is no ingredient in the conspiracy which is not present in the completed offenses defined in Sections 133 and 131 of the Criminal Code.

Section 133, insofar as it is pertinent to the facts of this case, reads as follows, 18 U. S. C. Sec. 239 (1946):

> "Whoever, being a juror * * *, shall * * * agree to receive any money * * *, upon any agreement or understanding that his vote, * * * shall be influenced thereby, or because of any such vote, * * *, shall be fined not more than $2000.00, or imprisoned not more than two years, or both."

It is to be noted that the wording of Section 133 is tracked in the allegation of the indictment (R. 6):

> "It was further a part of said conspiracy that the defendant Marcel F. LaBranche would agree to take money for his vote for acquittal of the defendant William T. Burton in the said trial."

Section 131, making it an offense to bribe a juror (*Slade* v. *United States,* 85 F. 2d 786 (10th Cir. 1936); *United States* v. *Zullo,* 151 F. 2d 560 (3rd Cir. 1945)), insofar as it is pertinent to the present case, reads as follows, 18 U. S. C. Sec. 237 (1946):

> "Whoever, directly or indirectly, shall give or offer or cause to be given or offered any money, * * *, or any promise or agreement therefor, * * * to any * * * other person authorized by any law of the United States to hear or determine any question, * * * with intent to influence his action, vote, * * *, or because of any such action, vote * * *, shall be fined not more than $20,000.00 or imprisoned not more than 15 years, or both, * * *."

It is to be further noted that the aforesaid allegations track the wording of Section 131.

Moreover the indictment charges and the evidence purports to show that the substantive offenses of agreeing to receive a bribe and of agreeing to give a bribe were in fact committed. Overt acts 8 and 9 charge the actual receipt of the bribe by LaBranche (R. 10). Moreover the Circuit Court in its opinion, finds that "Astorias corroborated as to his receipt of the money from Burton and its delivery to LaBranche" (R. 2195-6).

The Government contends that the present indictment tracks the indictment in *United States* v. *Manton,* 107 F. 2d 834 (2d Cir. 1938). However, a comparison of the two indictments shows that this is not the fact. In the *Manton* case it was held (p. 839) that the indictment did not "*charge a conspiracy to give or accept bribes*" (emphasis supplied), and that "the scheme of resorting to bribery being averred only to be a way of consummating the conspiracy, * * *."

On the other hand, the present indictment, insofar as it relates to the petitioner, simply charges and the Govern-

ment's evidence merely shows that Burton, Cawthorn and LaBranche conspired to commit the substantive offenses of agreeing to give a bribe, and of agreeing to receive a bribe, the only agreement alleged or as to which there was evidence being an agreement on the part of Burton and Cawthorn to give a bribe to LaBranche, and an agreement on the part of LaBranche to receive the same bribe. There is no ingredient in the conspiracy which is not present in the substantive offenses of agreeing to give a bribe and of agreeing to receive a bribe.

True, the indictment charges that the defendants Burton, Noe who was acquitted by verdict of the jury, Cawthorn and petitioner, together with Oliveira, Hughes and Astorias, referred to as co-conspirators but not indicted, and other persons unknown, conspired to commit offenses against the United States, that is to say, "corruptly to endeavor to influence, obstruct and impede and corruptly to influence, corrupt and impede the due administration of justice and prosecution", and "to defraud the United States of and concerning its governmental functions" of the proper petit jury trial. But of course, "the statement that the facts violate a certain section of the statute is nothing more than the pleader's conclusion, which may or may not be correct, and neither adds to or detracts from the allegation." *Harper* v. *United States,* 27 F. 2d 77, 79 (8th Cir. 1928); *Outlaw* v. *United States,* 81 F. 2d 805, 806 (5th Cir. 1936).

Had petitioner been charged, alone, with having received a bribe, under Section 133 of the Criminal Code (the only crime with which he legally could have been charged under the facts the Government contends it proved) he could not have been convicted of that crime, on the flimsy and uncertain evidence adduced against him, but knowing the character of that evidence and the impossibility of convicting him under it, the prosecutor resorted to the general conspiracy charge, hoping thereby to enmesh petitioner in the

web of evidence of a general conspiracy alleged to have been entered into by others of great political and social prominence. Thus petitioner became the innocent victim of a situation with the creation of which he had nothing to do, about which he did not know and with which he was unconcerned.

The tendency of the conspiracy dragnet to encompass too great an area has been pointed out judicially in *Krulewitch* v. *United States*, 336 U. S. 440, 445 (1949); *United States* v. *Falcone*, 109 F. 2d 579 (2d Cir. 1940). Your petitioner has been convicted of the greater crime of conspiracy upon no other evidence than that he agreed to receive a bribe from a party who was accused of other efforts to influence the jury. Such an extension of the crime of conspiracy is completely unwarranted and the court below should have dismissed the case as to your petitioner, since the Government's evidence showed no connection between your petitioner and the alleged general conspiracy.

II

Dismissal of the indictment was required for duplicity in charging in one count two separate offenses. The opinion of the Court below in its judgment of affirmance finds (R. 2193):

> "This [the indictment] sets forth a general conspiracy to endeavor to obstruct justice, and not confined to the juror LaBranche, which is criminal under Section 37 under both of its clauses. It was an offense against Section 135 of the Judicial Code, 18 U. S. C. A. § 241, to 'corruptly * * * endeavor to influence * * * in any court of the United States * * * any grand or petit juror * * * in the discharge of his duty * * *'. It was also a defrauding of the United States of its governmental right to have an unimpeded and unbiased jury to hear its case * * *".

Section 37 of the Criminal Code (18 U. S. C. Sec. 88 (1946)) reads as follows:

> "If two or more persons conspire *either* to commit any offense against the United States *or* to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000.00, or imprisoned not more than two years, or both." (Emphasis supplied.)

Section 37 defines and makes criminal two distinct offenses, (1) a conspiracy to commit an offense against the United States, (2) a conspiracy to defraud the United States. The use of the words "either" and "or" in said section clearly indicates alternative circumstances and was obviously intended to identify and define two wholly separate and distinct conspiracies. Cf. *Adolfson* v. *United States,* 159 F. 2d 883, 885 (9th Cir. 1947) cert. denied 331 U. S. 818; *Barkdoll* v. *United States,* 147 F. 2d 617, 618 (9th Cir. 1945).

Even in the Government's brief below, page 32, it is admitted that two separate conspiracies, hence two separate offenses, are charged in one count. To quote:

> "As already pointed out, the indictment, *in addition to charging a conspiracy to defraud, charges a conspiracy to violate Title 18, Section 241, U. S. C. A.*" (Emphasis added.)

If that statement is correct, it is an admission that two crimes are charged, in one count, in the indictment, one being a conspiracy to defraud, denounced as a crime by Section 37 Criminal Code, and the other being an entirely separate crime, being a conspiracy under Section 136, denouncing a conspiracy to do the things prohibited by Section 135, 18 U. S. C. Sec. 241 (1940).

That Section 37 defines two distinct offenses is made evident from the fact that the three year period of limitation is applicable to a conspiracy to commit an offense against the United States, *Greene* v. *United States,* 154 Fed. 401, 411 (5th Cir. 1907), while the six year period is applicable to a conspiracy to defraud. *Falter* v. *United States,* 23 F. 2d 420 (2d Cir. 1928), cert. denied 277 U. S. 590.

Section 37 should be construed as declaring not only against conspiracies to commit offenses against the United States, but also against conspiracies to defraud the United States, *Curley* v. *United States,* 130 Fed. 1 (1st Cir. 1904), cert. denied 195 U. S. 628. The indictment in the *Curley* case charged a conspiracy to commit an offense against the United States and a conspiracy to defraud the United States, but in separate counts.

Counsel does not contend that an indictment may not charge in one count a conspiracy to commit several offenses as long as the agreement is one, but counsel insists that an indictment cannot charge in one count two separate and distinct conspiracies, such as a conspiracy to commit an offense against the United States and a conspiracy to defraud the United States.

Section 37 does not make a defrauding of the United States a crime. As said by Judge Learned Hand in *Falter* v. *United States, supra* at 426: "the conspiracy to defraud was the crime and the crime consisted only in the fraudulent conspiracy."

It is therefore evident that the present indictment charging a conspiracy "which is criminal under Section 37 under both of its clauses" is bad for duplicity in that it joins two separate and distinct offenses in a single count of the indictment.

Section 1024 of the Revised Statutes (18 U. S. C. Sec. 557 (1946)) permits the joinder of two separate offenses in

one bill of indictment under certain circumstances, but directs that each offense shall be charged in separate counts. This was not done in the present case and the indictment is bad for duplicity. Duplicity is a defect in substance and not within the purview of either 18 U. S. C. Sec. 556 (1946) or 28 U. S. C. Sec. 391. *Creel* v. *United States*, 21 F. 2d 690 (8th Cir. 1927).

III

The decision of the court below is in conflict with the decision of this Court and results in the denial of the rights guaranteed the defendant in a criminal proceeding under the Sixth Amendment to the United States Constitution. The limitations placed on cross-examination of a Government witness by the defense practically excluded all cross-examination of this witness. The defense was thereby prevented from rebutting the inference arising from the Government witness' testimony and your petitioner was clearly prejudiced thereby.

The Government called as a witness one Adams, who had served with petitioner on the jury which tried Burton for income tax evasion in June 1945. Adams testified in behalf of the Government (R. 545) that petitioner voted "not guilty" during the entire course of the deliberations of that jury.

On cross-examination, petitioner's counsel asked Adams, "Mr. Adams, how many others voted for not guilty?", to which question Government Counsel objected (R. 545). The jury was retired and the objection argued. The jury was returned and the Court ruled (R. 554): "The objection is sustained". During the argument on the objection, in the absence of the jury, and after the Court had stated that it would sustain the objection, counsel requested the trial Court's permission to ask the questions (for the purpose of

making tender of proof that seven jurors, in addition to petitioner) had also voted not guilty, which request the Court refused (R. 553).

The very able opinion on this point of Circuit Court Judge Hutcheson dissenting from the Circuit Court's refusal to grant a rehearing (R. 2273) in itself presents the most convincing argument that prejudicial and reversible error was committed by the trial Court when it deprived defendant of the right to cross-examine this Government witness.

Certainly, when the jury retired for its 72 hours of deliberations, it left that court room under the erroneous impression that petitioner was the only juror who had voted "not guilty" in the 1945 Burton income tax evasion mistrial, and that erroneous impression, occasioned by the trial Court's refusal to permit petitioner to show the facts was certainly and greatly prejudicial to and a denial of petitioner's fundamental rights guaranteed by the Sixth Amendment to the Federal Constitution.

In the first place, it was not necessary for the Government to show how petitioner voted, for he could have been just as guilty of agreeing to accept a bribe, for a vote of "not guilty" even if he had voted guilty. How he actually voted was not an essential ingredient of the crime. He might, as doubtless has happened on occasions in history, have double-crossed his briber, and still have received, for argument's sake, the bribe. But the prosecution adopted the plan of conveying to the instant trial jury the idea that this petitioner was the only juror who had voted "not guilty" in the income tax trial, and by the trial Court's denying to petitioner the right to show that seven other jurors voted as he did, the right of petitioner to show the fact, in opposition to an inference left by the Government witness' testimony, the basic right of petitioner to defend himself was thereby denied.

In *Clark* v. *United States,* 289 U. S. 1 (1932), this Court pointed out the frequent confusion of juror privilege with something very different, the competency of jurors to testify as witnesses in impeachment of a verdict. Judge Hutcheson, in his dissenting opinion, *supra,* has very ably analyzed the *Clark* case and pointed out the error of the trial court's conclusion as to what Mr. Justice Cardozo held.

The discussions among the members of a petit jury and their deliberations are not protected from disclosure when disclosure becomes necessary to the administering of justice in another judicial proceeding. This is not a case where one who was a member of a jury claims the privilege of being protected against disclosure of what occurred in the jury room. Even the so-called privilege in that respect is limited to cases where the disclosure would be impertinent. *Clark* v. *United States, supra; State* v. *Serpas,* 188 La. 1074, 179 So. 1 (1938).

In the instant case, government counsel admitted that privilege was not involved (R. 549), and the court based its ruling purely on the grounds of relevancy (R. 550). The *Clark* case and the *Serpas* case both considered this point and both allowed the votes of all of the members of the jury to be shown. Close analogies to the case at bar are found in the cases holding flight of one accused of crime from the vicinity of the crime after its commission is always admissible as conduct compatible with guilt and having probative weight in determining whether or not the defendant committed the crime. It has been held many times that if the state introduces such evidence consonant with a theory of guilt, the defense is then entitled to introduce any evidence to explain away or destroy the inferences arising from the state's evidence. *Underhill on Criminal Evidence* § 12; *State* v. *Isensee,* 64 N. D. 1, 249 N. W. 898; *Goforth* v. *State,* 183 Ala. 66, 63 So. 8; *Commonwealth* v. *Goldberg,* 212 Mass. 88, 98 N. E. 692.

The testimony of Adams was very important and great latitude should have been allowed his cross-examination, as that would have been the only means of placing his testimony in proper perspective before the jury. Denial of reasonable latitude in cross-examination is prejudicial error; it was not even necessary for defendants to show that cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief; cross-examination is necessarily exploratory and the right to conduct same within fair limits is a matter of right, and the denial of the same is error. *Alford* v. *United States,* 282 U. S. 687, 692 (1931).

Judge Hutcheson in his dissent in this case states (R. 2277):

> "to permit the government, as was done here, to offer a witness and then to deny defendant reasonable cross-examination of that witness is contrary to common fairness as understood by every standard of American justice in due process of law. This being so, I am constrained to believe and state that, in my opinion, the District Judge, in permitting the government to offer in evidence so much of what transpired in the petit jury room as suited its purpose, and then denying the right to defendant to elicit from the same witness, who knew the facts, testimony beneficial to defendants as to what went on in the jury room, committed not merely harmless, but highly prejudicial error, for which the * * * judgment [should be] reversed."

The Sixth Amendment to the United States Constitution guarantees that the accused shall be given an opportunity to cross-examine any witnesses. *Curtis* v. *Rives,* 123 F. 2d 936 (D. C. Cir. 1941); *Dowdell* v. *United States,* 221 U. S. 325, 329 (1911). The ruling of the trial court excluded from the scope of cross-examination the vote of any other juror, although on direct examination the only rele-

vant matter to which the witness had testified was the vote of your petitioner. This circumscription of the scope of cross-examination effectively excluded the defense from pursuing the only topic within the witness' knowledge bearing on petitioner's guilt or innocence, almost completely denying petitioner the exercise of his constitutionally protected right to confrontation.

IV

The decision of the Court of Appeals in upholding exclusion of evidence of a prior sworn statement by government witness Astorias, and of transcripts of grand jury testimony of proceedings involving government witness Astorias, is in conflict with decisions of this Court and of the Second Circuit.

The witness, Astorias, who is named in the indictment as a co-conspirator, but not indicted, on September 21, 1945, more than two years before the trial of the instant case, had given the Treasury Agents a sworn statement (Exhibit Burton #1, R. 1661), in which he swore that he had never had "any financial transactions with Mr. Burton" and "I have never held any fund for Mr. Burton", whereas, he testified on this trial, that Burton had given him a package (in which he saw money) which he delivered to a man who looked like petitioner and who the Government contends it proved was petitioner. On the same day, September 21, 1945, this same witness appeared before the Grand Jury that returned this indictment and swore that he knew nothing about the case. (Exhibit Burton #2, R. 1664). On October 16, 1945, he again appeared before the Grand Jury and under oath testified (Exhibit Burton #3, R. 1686) that he knew neither petitioner nor Oliveira, the other prosecuting witness, who was also named as a co-conspirator but not indicted (R. 1705). In that appearance, he denied the instance of a man coming

to get a package, about which he testified on the trial. In his first two appearances before the Grand Jury, as the exhibits show, he was threatened by the District Attorney and Grand Jurors with being indicted for perjury and with income tax evasion (neither of which occurred). On his cross-examination, on the instant trial, defendants offered in evidence (R. 1347) the Exhibits Burton #1, #2 and #3 above mentioned, but upon the Government's objection (R. 1348) the trial Court sustained the objection and excluded the Exhibits (R. 1355).

Needless to say, petitioner's counsel, having in mind the prior ruling admitting in evidence Walmsley's Grand Jury testimony[1], was taken by surprise when the Astorias prior sworn contradictory statements were excluded and the trial jury not permitted to hear them read.

Astorias' Grand Jury testimony, had the Court permitted it to be read to the trial jury, would have shown the state of mind of that prosecuting witness, and, therefore, the motive of the witness for testifying falsely on the trial. Anything which would throw light upon the witness' state of mind was entirely proper, either by cross-examination of the witness, himself, or by any other independent evi-

[1] Government witness, Walmsley, had testified before the Grand Jury, fully exculpating Governor Noe. And when he testified on the trial to a different state of facts, the court permitted the introduction of his Grand Jury testimony and it was read to the trial jury (R. 496). Noe, a former Governor and Democratic National Committeeman from Louisiana, who had held other high political offices in the State and was prominent in the social, business and political circles of the State, was acquitted, probably because the trial jury did not believe Walmsley, after it was shown that before the Grand Jury he had sworn to a radically different story. This petitioner, on the other hand, being a small, unknown citizen of the State, a laborer, without prominence, was, as to the witness Astorias, denied the same right extended to defendant with respect to the witness Walmsley. This petitioner was convicted, which would have been unlikely, to say the least, had the trial jury known that Astorias had three times, under oath, denied knowledge of any fact connected with the case and had changed that denial only after being threatened by the District Attorney and the Grand Jurors with indictment for various crimes.

dence to show a belief or even only a hope on his part that he would secure immunity in return for his testimony. See *Farkas* v. *United States,* 2 F. 2d 645, 647 (6th Cir. 1924).

The trial Court carefully considered the question of admission of the statement and transcripts of the Grand Jury proceeding (R. 545, *et seq.*). Defense counsel submitted a written memorandum (Burton Exhibit X, R. 1797) to the effect that:

> "This grand jury testimony is to be read to the jury because of the foundation laid and because this testimony tends to show that the witness testified as a result of fear, and under duress, hence has an interest and a motive and is biased.
>
> "This testimony is admissible as an independent proposition without regard to the rules relating to impeachment."

The trial court ruled that "witness cannot be discredited or his hostility or bias shown by proving statements made by him outside the court which do not harmonize with statements made by him on the witness stand until his attention has been called specifically to the former statements, particularly as to the time, place and circumstances, so that he can deny or explain them," and held the proper foundation had not been laid (R. 1355).

However, much of the transcript the defense wished to read to the jury was not statements of the witness, but rather statements by the jurors and the government attorney. Therefore, the Court of Appeals found it necessary to rule on the exclusion of these statements.

In affirming the judgment of the trial Court, it ruled that the witness' prior contradictory statements and statements showing bias are admissible as impeachment only under the limitations stated by the trial court. As to the statements contained in the Grand Jury transcript showing

threats of prosecution for income tax evasion and perjury, the Court ruled (R. 2198):

> "Astorias fully testified in this trial that he was thus put in fear about his income taxes and got him a lawyer and on the lawyer's advice and in his company, he went to the district attorney and told all he knew, and was allowed to pay his income tax deficiency with penalties. There was thus already in evidence without contradiction all that these lengthy documents would tend to show along this line. If there was error in excluding pertinent parts of them offered for this not clearly expressed purpose, we do not think it was reversible error."

The ruling of the trial Court in excluding all of the proffered exhibits on the ground of insufficient foundation was in conflict with *United States* v. *Beekman*, 155 F. 2d 580, and *Ewing* v. *United States*, 135 F. 2d 633, 640, which clearly hold that extrinsic evidence of bias does not require a foundation but may be introduced even if no inquiry at all had first been made of the witness in regard to it. See *United States* v. *Schindler*, 10 Fed. 547, 549; 3 WIGMORE ON EVIDENCE, (3d ed.) §§ 948, 953, p. 514, note 2. In endeavoring to show that the trial court had not committed reversible error, the court of appeals stated that the extrinsic evidence of bias was already before the jury because of the admissions made by Astorias and therefore the refusal of the trial court to permit the defense to read the transcripts of the Grand Jury proceedings to the jury was harmless (R. 2198). This ruling of the Court of Appeals is directly in conflict with *United States* v. *Krulewitch*, 145 F. 2d 76, 78, wherein it was contended that the exclusion of the witness' prior contradictory statement had worked no harm because the falsity of such statement had already been admitted by the testimony of the witness. For the court, Judge Learned Hand held that

"such testimony has never been regarded as the equivalent of the contradictory statement itself." 3 WIGMORE ON EVIDENCE, (3d ed.), § 1037, states that:

> "Even where the witness *admits* having made the other statements, this does not prevent the opponent from offering it in evidence by his own witnesses; for he may prefer to have it clearly brought out and emphasized, and it would be unfair to restrict him to the unemphatic mode of approving it by the witness' admission and to subject him to the necessity of disputing whether the admission has been full and exact."

Furthermore, both the District Court and the Court of Appeals were in error when they stated that a foundation had not been laid for introducing the prior contradictory statements. Burton's Exhibit I (R. 1661), a statement to the government agent exculpating Burton, was discussed at great length with the witness and the contradictions between that statement and his testimony at the trial were pointed out to him (R. 652-654). The witness admitted making this statement and identified his signature (R. 696). This was ample foundation under the rule established by this Court in *Chicago, M. & St. P. Ry.* v. *Artery,* 137 U. S. 507, 519 (1890), and followed in *United States* v. *Dilliard,* 101 F. 2d 829 (2d Cir., 1938), cert. denied 306 U. S. 635.

Also erroneous is the ruling of the Court of Appeals that all that could be shown as to bias by way of extrinsic evidence was already before the jury. The record shows Astorias was asked if he was scared of indictment for income tax evasion or for talking to a grand juror outside the grand jury room. He replied that "No sir, I am not afraid, that's the God's truth" (R. 664). He emphatically stated that he was not threatened with indictment for evasion of income taxes (R. 663), but what the barred grand jury transcripts would have revealed had they been received in evidence was that he was threatened repeatedly

with indictment for perjury because of his testimony concerning his income (R. 1698, 1700, 1708). None of the threats were ever brought to the trial jury's attention, whereas the transcript of the grand jury record indicates that he was theatened. Thus, your petitioner was denied the right to impeach the evidence of a principal government witness and in a trial turning on the relevant credibility of various witnesses, this error greatly prejudiced your petitioner.

V

The verdict of the jury was coerced by the Judge, thus depriving petitioner of a fair trial.

The jury retired to deliberate on Saturday, May 15th, 1948, at 10:18 A. M. After the jury had deliberated for more than 25 hours, the Court sent for the jury. This was on Sunday, May 16th, 1948, at 12:00 noon (R. 1453).

The following colloquy and supplemental instructions were then given by the Court (R. 1453 *et seq.*):

> "The Court: Gentlement, you have been out for twenty-five hours on this case. I will ask a question and I want a yes or no answer, and no further or additional information. Have you been able to agree upon a verdict?
>
> "Jurors: No.
>
> "The Court: Under the circumstances, I will give you further and additional instructions. The language of the instructions which I shall give you is the language that has been approved by the Supreme Court of the United States in case of Allen vs. United States, U. S. Reports 146 [sic] at page 492:"

The trial court then proceeded to give the "so-called *Allen* case" supplemental charge, 164 U. S. 492.

The jury then retired and thereafter was kept incom-

municado and left to sweat it out in a small room in the Post Office Building (the Grand Jury Room on the third floor) for two additional days. The intolerable heat of such a room, unairconditioned, just under the roof of a building in the City of New Orleans, in mid-June, can be well imagined. The jury was never given an opportunity to appear in court again after the supplemental instructions. They were forced to deliberate 72 hours, sleeping time excepted; they were locked up and held incommunicado for 48 hours after they announced to the court that they were unable to agree.

The Allen charge is designed to have the dissenting juror re-examine his own conscience and the basis upon which he dissents. It emphasizes the desirability of the minority surrendering its belief in favor of that of the majority.

This charge has been approved by this Court in one instance, but when combined with other language, has been disapproved by other federal courts. *E. g., Edwards* v. *United States,* 7 F. 2d 598 (8th Cir. 1925); *Stewart* v. *United States,* 300 Fed. 769 (8th Cir. 1924). The coercive effect of this type of charge "depends upon the situation at the time it is given * * *". *Nick* v. *United States,* 122 F. 2d 660 (8th Cir. 1941) cert. denied 314 U. S. 687. The court below held that there was no error in giving the instruction here (R. 2199), but factually the defendants were gravely prejudiced by this instruction.

A juror was on trial accused of being part of a conspiracy. It was evidence against the defendant that he voted not guilty, and no mention was made as to other jurors sharing his view. This judge at the income tax trial had called on investigators to investigate the jurors' honesty (R. 542) and now he was presiding at the trial occasioned by that investigation. A single juror still retaining reasonable doubt as to your petitioner's innocence might well have felt

coerced into the verdict by the implied threat contained in the "Allen charge" combined with these circumstances. The extreme care and caution recognized by this Court as essential to protect defendants from such coercive instructions (*Burton* v. *United States,* 196 U. S. 283) here justifies interposition by this Court to emphasize that surrounding circumstances may make prejudicial a charge otherwise proper.

Conclusion

Petitioner's basic rights have been violated and he has been deprived of a fair trial.

Unless the supervisory power of this Honorable Court is exercised, vital errors, which this Court has never hesitated to correct, will have been permitted to destroy his basic rights.

WHEREFORE, it is respectfully submitted that this petition for Writ of Certiorari should be granted.

Respectfully submitted,

BENTLEY G. BYRNES,
Counsel for Petitioner.

OCTOBER 1949.

APPENDIX

Title 18 U. S. C. Sec. 88. (Criminal Code, section 37.) CONSPIRING TO COMMIT OFFENSE AGAINST UNITED STATES. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000.00, or imprisoned not more than two years, or both. (R. S. Sec. 5440; May 17, 1879, c. 8, 21 Stat. 4; Mar. 4, 1909, c. 321, Sec. 37, 35 Stat. 1096.)

Title 18 U. S. C. Sec. 241. (Criminal Code, section 135.) ATTEMPTING TO INFLUENCE WITNESS, JUROR, OR OFFICER. Whoever corruptly, or by threats or force, or by any threatening letter or communication, shall endeavor to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or officer acting as such commissioner, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proeeeding before any United States commissioner or officer acting as such commissioner, in the discharge of his duty, or who corruptly or by threats or force, or by any threatening letter or communication, shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede, the due administration of justice therein, shall be fined not more than $1,000.00 or imprisoned not more than one year, or both. (R. S. Subsection 5399, 5404; Mar. 4, 1909, c. 321, Section 135, 35 Stat. 1113.)

Title 18, U. S. C. Sec. 242. (Criminal Code, section 136.) CONSPIRING TO INTIMIDATE PARTY, WITNESS, OR JUROR. If two or more persons conspire to deter by force, intimidation, or threat, any party or witness in any court of the United States, or in any examination before a United States commissioner or officer acting as such commissioner, from attending such court or examination, or from testifying to any matter pending therein, freely, fully, and truthfully,

or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or on account of his being or having been such juror, each of such persons shall be fined not more than $5,000 or imprisoned not more than six years, or both. (R. S. Section 5406; Mar. 4, 1909, c. 321, Section 136, 35 Stat. 1113.)

Title 18, U. S. C. Sec. 556. SAME; DEFECTS OF FORM. No indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant. (R. S. sec. 1025.)

Title 18, U. S. C. Sec. 557. SAME; JOINDER OF CHARGES. When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated. (R. S. sec. 1024.)

Title 28, U. S. C. Sec. 391. (JUDICIAL CODE, section 269, amended) NEW TRIAL; HARMLESS ERROR. All United States courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law. On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties. (R. S. sec. 726; Mar. 3, 1911, c. 231, sec. 269, 36 Stat. 1163; Feb. 26, 1919, c. 48, 40 Stat. 1181.)

Sixth Amendment to the Federal Constitution

Rights of the accused—In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

Nos. 416, 417 and 418

WILLIAM T. BURTON, JOE T. CAWTHORN, AND MARCEL F. LABRANCHE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 2191-2199) is reported at 175 F. 2d 960. The dissenting opinion by Circuit Judge Hutcheson (R. 2273-2277) on motions for rehearing, is reported at 176 F. 2d 865.

JURISDICTION

The judgment of the Court of Appeals was entered on July 18, 1949 (R. 2200) and petitions for rehearing were denied on September 23, 1949 (R.

2278). The petitions for writs of certiorari were filed on October 22, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether, in a prosecution for conspiring to tamper with a jury, where the prosecution proved by the testimony of one member of the jury in question that another juror, one of the alleged co-conspirators, voted throughout the jury deliberations for acquittal, the trial judge erred in refusing to permit the defense to cross-examine the witness as to how the other jurors finally voted.

2. Whether, after defense counsel were allowed to examine a prior statement by a government witness and his testimony before the grand jury before cross-examining him, it was improper for the court to exclude such documents, later offered for the purpose of impeachment and as showing bias.

3. Whether the giving of the so-called *Allen* instruction, after the jury was unable to agree for twenty-five hours, and two days before the jury returned a verdict, was an illegal coercion of the jury verdict.

4. Whether the indictment was duplicitous for charging a conspiracy to obstruct the administration of justice and to defraud the United States of its right to an honest and unbiased jury.

5. Whether the only charge and evidence against petitioner LaBranche was with respect to the substantive offense of bribery so that he could not be guilty of conspiracy.

STATUTES INVOLVED

Section 37 of the Criminal Code (18 U.S.C. [1940 ed.] 88) provided:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Section 135 of the Criminal Code (18 U.S.C. [1940 ed.] 241) provided in pertinent part:

> Whoever corruptly * * * shall endeavor to influence, intimidate, or impede any witness, in any court of the United States * * *, or any grand or petit juror * * * of any court of the United States, * * * or who corruptly * * * shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede, the due administration of justice therein, shall be fined not more than $1,000, or imprisoned not more than one year, or both.[1]

[1] The maximum fine and prison term imposable under this section were increased to $5,000 and five years, respectively, by the Act of June 8, 1945, c. 178, § 1, 59 Stat. 234, which was passed during the continuance of the conspiracy charged in the instant case.

Section 136 of the Criminal Code (18 U.S.C. [1940 ed.] 242) provided in pertinent part:

> If two or more persons conspire * * * to influence the verdict * * * of any * * * petit juror in any such court [*i.e.*, of the United States], * * * each of such persons shall be fined not more than $5,000, or imprisoned not more than six years, or both.[2]

STATEMENT

On January 3, 1946, a single-count indictment (R. 3-11) was filed in the United States District Court for the Eastern District of Louisiana. It charged the petitioners, William Burton, Joe Cawthorn, and Marcel LaBranche, together with James Noe, a codefendant, with having conspired with one another and with three others not indicted, Edwin Oliveira, Bernard Hughes, and John Astorias, "to commit offenses against the United States," namely, "corruptly to endeavor to influence, obstruct and impede and corruptly to influence, obstruct and impede the due administration of justice" in a certain criminal trial, held in June 1945 in the same federal district court, in which the petitioner Burton had been charged with income tax evasion, and "to de-

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[2] This section was amended, by the Act of June 8, 1945, c. 178, § 3, 59 Stat. 234, which was passed during the continuance of the conspiracy charged in the instant case, to read, in pertinent part:

"If two or more persons conspire to violate any provision of section 135 * * * of the Criminal Code, as amended, and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished in like manner as provided by [that section]."

fraud the United States of and concerning its governmental function of considering and deciding [Burton's guilt in the tax case] through the petit jury * * * free from corruption, improper influence and fraud, by virtue of the personal and pecuniary interest of the petit jurors in the success of the defendant in the said criminal prosecution" (R. 4-5), in violation of Section 37 of the Criminal Code, (*supra*, p. 3).

Petitioner Burton was the principal figure involved, and the evidence showed one general conspiracy to effect his acquittal at his tax evasion trial, which lasted from June 4 to June 27, 1945 (R. 358, 1499-1500). The efforts of all the co-conspirators were directed to the achievement of this result.

The defendant Noe was a former Governor of Louisiana (R. 874) and a good friend of Burton (R. 1365). Knowing that Fred Dinghaus was a member of the petit jury panel for the trial of Burton's case (R. 453), Noe asked him in a conversation two or three weeks before the trial if he was on the jury. When Dinghaus replied that he was, Noe said, "Well, Burton is a good friend of mine; he is nothing but a country yap * * * and knows nothing about office work or bookkeeping." After Dinghaus answered that this did not make any difference because he would find a defendant guilty or not by giving him a fair trial according to what the evidence was, Noe said, "Well, I am sure that's all Mr. Burton would want." (R. 455, 456). Three

or four weeks after the Burton case ended in a mistrial, Noe summoned Dinghaus to his office and "thanked" him "for the outcome of the Burton case" (R. 457). Dinghaus demurred, saying, "I don't know whether or not you know how I voted." Noe replied, "Regardless of how you voted, I want to thank you anyway." (*Ibid.*)

The alleged co-conspirator Hughes, an insurance man, approached Henry Groffman, also an insurance man, in May 1945, after learning that Groffman was on the jury panel for Burton's trial. As a ruse to meet Groffman, Hughes stated he had an insurance prospect who was overweight and might get a better rate with one of Groffman's companies. (R. 449-451.) Immediately after their meeting began, Hughes mentioned the fact that Groffman was on the jury and stated that Burton was "the finest man in the world, but ignorant of bookkeeping and income taxes." He also asked Groffman several times to do "the right thing" for Burton. (R. 450.) Groffman, however, was subsequently excused from service on the Burton jury (R. 451). Supplementary evidence, tending to explain Hughes' interest in helping Burton to get acquitted, was as follows: Hughes had been foreman of a petit jury which had acquitted the alleged co-conspirator Noe in a tax evasion trial in 1942 (R. 450, 877); Noe thereafter purchased substantial amounts of insurance through Hughes as broker (R. 363-364, 371, 376, 380; Gov. Exs. 7 and 14, R. 1503, 1514); up to about the time of Burton's tax evasion trial, Noe owed

Hughes substantial sums in connection with these insurance transactions (R. 427-428, 432-433, 959; Gov. Ex. 48, R. 1589; Noe-Ervin Ex. 14, R. 1828-1829); Noe paid these debts at about the time of the commencement of Burton's tax trial (R. 407; Gov. Exs. 37 and 40, R. 1580-1581, 1584); the payment was made possible by Noe's obtaining funds from Burton (R. 399-400, 435-436, 998; Gov. Ex. 43, R. 1586).

Around the latter part of May or the first part of June, 1945, Hughes Walmsley, who knew both Noe and petitioner Cawthorn (R. 464), met them at his office at Noe's suggestion. Either Noe or Cawthorn, who was Burton's trial counsel in the tax fraud case (R. 1165-1167), showed Walmsley a list of the prospective jurors, and asked if he knew any of them (R. 465). After indicating he knew about ten of the jurors, Walmsley was asked by either Noe or Cawthorn if he knew any of them well enough to talk to them, to which Walmsley answered, "No" (R. 466). Noe and Cawthorn told Walmsley that it would be to his interest if he could help them in the matter of talking to the jurors, but he said he was not interested (R. 467). Later, about June 19, 1945, during the course of the Burton trial, Noe told Walmsley it would be to his benefit if he could help in the matter they discussed at the latter's office (R. 467). Also during the Burton trial, Cawthorn told Walmsley, in the lobby of the Roosevelt Hotel in New Orleans, that he could make $1,000 if he would "talk to those fel-

lows," but Walmsley declined, saying he was not interested (R. 468-469). On a second occasion during the trial, in the same hotel lobby, Cawthorn asked Walmsley if he would talk to any of "those people," but was told, "No." (R. 470.) On a third occasion in this hotel lobby, during the early part of June 1945, Burton himself spoke to Walmsley about his lack of bookkeeping knowledge and complained that the Government was taking unfair advantage of him (R. 471). Walmsley did not contact any of the jurors either prior to or during the trial (R. 471).

Oliveira and his "good friend", petitioner LaBranche, were both members of the jury panel selected for the Burton trial (R. 557, 558, 559). On or about June 4, 1945,[2] Oliveira and LaBranche, having heard a rumor that "there would be plenty [of] money put out for the jury," agreed that if either of them should be chosen to serve on the jury, they would divide any money received by the one selected. Oliveira was excused by the Government from jury service, but LaBranche served. (R. 558-559.) That evening the two men met at the "Town Club" in New Orleans, where Oliveira said he would make "the necessary contacts" for getting "some money" (R. 559-560). Later, Oliveira met petitioner Cawthorn on the street. Caw-

[2] All dates referred to in Oliveira's testimony are approximate only. Oliveira testified that he could not possibly remember the exact dates of his meetings and conversations with LaBranche, Cawthorn, and Burton (R. 567, 571, 575, 577, 580, 584, etc.).

thorn told Oliveira he was sorry the latter did not "get on the jury," but asked if he had any "good friend" on it. Oliveira mentioned LaBranche, and Cawthorn inquired whether LaBranche could be trusted and whether he would be interested in "making some money." Oliveira said he would have to discuss the matter with LaBranche. Cawthorn admonished Oliveira to "be careful, because you are dealing with the Government. It is a serious matter." (R. 561, 562.) When Oliveira next saw LaBranche, LaBranche at first seemed not interested, but finally told Oliveira to "see what you can do" about "getting some money" (R. 562-563). Thereafter, Cawthorn and Oliveira again met on the street. Cawthorn told Oliveira to inform LaBranche that there "will be a thousand dollars for him and five hundred for you if he votes favorably in the acquittal of Mr. Burton." (R. 563.) This agreement had been approved by Burton (R. 566). When Oliveira conveyed this message to LaBranche, LaBranche expressed concern at the chances he and Oliveira were taking, and it was decided that Oliveira should see Cawthorn again in an effort to get "a larger amount of money" (R. 563, 564.) Later, Cawthorn met Oliveira in the St. Charles Hotel lobby (R. 566), where Cawthorn told Oliveira to meet him in a certain room in the hotel. Oliveira there reported to Cawthorn that LaBranche "wasn't satisfied." Cawthorn told Oliveira to "go back and tell LaBranche not to worry about that money— * * * that we all

would get more money after the trial was over; that Burton was a good fellow." (R. 567-568.) At about the middle of the trial one night in the Roosevelt Hotel, Burton personally confirmed Oliveira's understanding, reached with Cawthorn, that LaBranche was to receive $1,000 and Oliveira $500 (R. 568, 569).

On the evening of the day on which the trial ended (R. 569), Oliveira asked Burton about the money, and Burton advised him that he would get the $1,500 in a package from the alleged co-conspirator Astorias, the Roosevelt Hotel chef, on the following morning (R. 570). When Oliveira asked Astorias for the package, Astorias said he knew "Mr. Burton very well, but he didn't leave any package" (R. 571). When Oliveira imparted this advice to LaBranche, the latter lamented, "It looks like we're blowed up—that we ain't going to get anything" (R. 572). However, about two weeks after the trial, LaBranche did receive from Astorias a package containing $1,500, which Burton had left with Astorias to be turned over to LaBranche (R. 573, 650). Oliveira and LaBranche divided the money at the Monteleone Hotel (R. 573). Some two to four weeks later, Burton thanked Astorias "for giving the man the package, it worried the hell out of me" (R. 651).

The Government also showed that on or about May 24, 1945, eleven days before the commencement of his tax evasion trial on June 4th, petitioner Burton drew $70,000 from his personal account in

a Lake Charles, Louisiana bank (R. 1411-1412; Gov. Ex. 65, R. 1605). Burton admitted drawing out this money (R. 1411) and described it as his "fighting fund" (R. 1415).

At Burton's tax evasion trial, LaBranche voted for Burton's acquittal during the entire course of the deliberations (R. 545). That prosecution resulted in a mistrial because of failure of the jury to agree (R. 358, 1499-1500).

The jury in the instant trial acquitted Noe, but found petitioners Burton, Cawthorn and LaBranche guilty (R. 287). Each of the petitioners was sentenced to two years' imprisonment and to a fine of $10,000 (R. 2165, 2166-2167, 2167-2168). On appeal to the Court of Appeals for the Fifth Circuit, the judgments of conviction were affirmed (R. 2200). Petitions for rehearing were thereafter denied (R. 2278), one judge (Hutcheson, J.) dissenting, expressing the view that the convictions should be reversed and a new trial granted, on the sole ground that the trial court committed prejudicial error in limiting the cross-examination of a certain prosecution witness, a juror in the Burton trial (R. 2273-2277), as to which see pp. 11-23, *infra*.

ARGUMENT

1. Leon Adams, one of the jurors in the Burton tax evasion prosecution, was a government witness in the instant conspiracy case (R. 544). On direct examination, he testified, without objection, that petitioner LaBranche, one of his fellow jurors in

the tax evasion case, voted for Burton's acquittal "[d]uring the entire course of the deliberations" (R. 544-545). The obvious purpose of the Government in eliciting this testimony was, of course, to corroborate so much of the Government's other evidence (see pp. 8-11, *supra*) as tended to show a conspiracy on the part of petitioners to purchase LaBranche's favorable vote as a juror in the tax evasion prosecution. On cross-examination, Adams was asked "how many other [jurors] voted for not guilty?" (R. 545.) Government counsel objected on the ground that it was "entirely irrelevant and immaterial" how other jurors voted (*ibid.*).

Argument on the question of the propriety of this line of cross-examination was then had outside the presence of the jury (R. 546-554). The essence of defense counsel's argument in support of the legitimacy of the challenged question was as follows (R. 550):

> * * * This witness [Adams] is presented by the Government. * * * he is asked a question, how did a particular man vote? Well, I would think it would be absolutely elementary that on cross-examination this witness' *memory can be tested,* his credibility can be tested and he can be asked, individually, the names of every one of those men *to determine whether or not he remembers how everybody else voted.* * * * [italics added]

The trial judge countered that "you can't test the credibility of a witness on a collateral matter" (R.

551), to which defense counsel replied, "You can't contradict a witness on a collateral matter, but you certainly *can test his credibility* on a collateral matter" [italics added] (*ibid.*). Further exchanges between the trial judge and defense counsel in this colloquy likewise indicate that the point at issue between them was the propriety or impropriety of the question which occasioned the colloquy as a cross-examination device for exploring the matter of the witness Adams' *memory and credibility* in respect of his direct testimony that LaBranche had voted for Burton's acquittal throughout the jury's deliberations (see R. 551-552).

At the conclusion of the colloquy, the trial judge announced his decision in these terms (R. 552-553):

> * * * you can't test his credibility on a collateral matter. I am convinced * * * that it is entirely irrelevant * * * how other jurors voted in this proceeding. * * * It is certainly not the purpose of the Court to shut off any cross-examination that the Court considers proper. I simply intend to rule * * * that I take it it will be improper to ask the witness how the balance of the jury voted in this case. * * * that is the only restriction I am placing on the cross-examination.

The jury was then recalled and the cross-examination of Adams resumed. Defense counsel was permitted to ask the witness if he remembered how each of eight other named jurors voted, "without saying how he voted," and the answer was in the

affirmative in each instance (R. 555). The judge also permitted the following question (*ibid.*): "Do you remember whether or not any of those men, without naming them or saying how they voted, took one position at the first ballot and didn't change throughout?" The reply, not entirely responsive, was (R. 556): "There were some changes. There were changes during the deliberations from the original ballot. * * * There were certain ones that might have changed—that did change." This reply evidently satisfied defense counsel, as no further questions were asked the witness.

The dissenting judge below based his dissent solely on his belief that the trial judge erred in refusing to permit the witness Adams to be cross-examined as to how many jurors other than LaBranche voted for Burton's acquittal. He said (R. 2275-2276):

> It is and was the contention of the defendants that had the juror [Adams] been permitted to testify as to how each juror voted, his testimony would have shown that some of them voted for acquittal, some for conviction, and that when the jury was discharged, eight were for acquittal and four were for conviction. Their cross examination limited on the wholly untenable theory that how the other jurors voted was immaterial, defendants, compelled to have the issue go to the jury on the evidence that LaBranche had voted throughout for acquittal, were deprived of their right to show that others had voted for acquittal too * * *.

Petitioners now adopt this argument (Burton Pet. 8-15; Cawthorn Pet. 18-21; LaBranche Pet. 20-24). Thus, petitioner Burton argues (Pet. 12) that "As a result of the trial court's action * * * the defendants were prevented from showing that numerous other members of the jury in the income tax case had voted for acquittal." And see Cawthorn Pet. 20; LaBranche Pet. 20-21. As we have pointed out, however (*supra,* pp. 11-13), the sole articulated point of dispute between defense counsel and the trial judge during the colloquy concerning the propriety of the controverted question sought to be asked Adams was the legitimacy of that line of questioning as a means of testing Adams' *memory and credibility* in respect of his direct testimony that the juror LaBranche had voted for acquittal throughout the jury's deliberations.[4]

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[4] It is true that in one isolated passage during the colloquy, which extended over some nine pages of the printed record (R. 546-554), defense counsel remarked that "it would be most unfair to have it appear here now that LaBranche was the only one that voted that way" (R. 552). Whatever merit this point might have had, however, it was articulated at no other time during the colloquy, and it is manifest from a reading of the colloquy as a whole that it was never brought home to the trial judge as possibly a sound basis for the admissibility of the controverted line of questioning, distinct from its asserted relevancy as a test of the witness' memory and credibility. Cf. *Johnson* v. *United States,* 318 U. S. 189, 199-201.

The only other record reference supplied by petitioners (see Burton Pet. 12) as evidence of their reliance at the trial on the now-asserted claim that the disputed line of questioning was relevant to show that other jurors than LaBranche also voted for Burton's acquittal is R. 2142, where defense counsel stated: "* * * we proposed to show, as a matter of fact, the jury was eight to four for acquittal * * *." This, however, occurred long after the trial in connection with argu-

But apart from petitioners' tardiness in articulating this contention, we submit that it is without merit. Their reliance on *Clark* v. *United States*, 289 U. S. 1, 12-19, is misplaced. That case involved a prosecution for contempt of court by one Mrs. Clark, the charge being that she, a prospective juror in the trial of one Foshay for mail fraud, wilfully concealed at her *voir dire* examination the fact that she had formerly been employed by a company headed by Foshay and had other reasons to be biased in Foshay's favor, and wilfully and falsely swore to lack of bias with respect to Foshay. At the trial on the contempt charge, the Government adduced evidence to show Mrs. Clark's bias in favor of Foshay (and consequently the false and misleading nature of her answers on the *voir dire*), and also showed that during the jury deliberations in the Foshay trial (which resulted in a mistrial by virtue of a hung jury, 11 jurors having been for conviction and one for acquittal) Mrs. Clark was the one juror who steadfastly voted for Foshay's acquittal. The sole issue before this Court (having any relevance to the issue in the present case) was the admissibility of Mrs. Clark's conduct as a juror in the Foshay trial and the manner in which she held out for Foshay's acquittal throughout the

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ments on motions to set aside the verdicts (see R. 2122). Even at that stage of the proceedings, moreover, it is clear that this argument was so blended and confused with the distinct argument relating to the question's relevance in respect of the issue of Adams' memory and credibility that it was never adequately brought to the trial judge's attention.

jury's deliberations. The argument advanced in opposition to the admissibility of this evidence was, in the words of the Court (289 U. S. at 12-13), that "* * * the arguments and votes of jurors, the *media concludendi,* are secrets, protected from disclosure unless the privilege is waived. * * * Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world." But the Court, while conceding the "force of these considerations" (289 U. S. at 13), held that social policy dictated an *exception* to this basic rule where a juror in a given case became a juror by virtue of concealment of the truth at her *voir dire* examination. The Court said (289 U. S. at 14):

> The privilege [not to have one's conduct and vote as a juror disclosed] takes as its postulate a genuine relation, honestly created and honestly maintained. If that condition is not satisfied, if the relation is merely a sham and a pretense, the juror may not invoke a relation dishonestly assumed as a cover and cloak for the concealment of the truth. In saying this we do not mean that a mere charge of wrongdoing will avail without more to put the privilege to flight. There must be a showing of a *prima facie* case sufficient to satisfy the judge that the light should be let in. Upon that showing being made, the debates and ballots in the jury room are admissible as corroborative evidence, supplementing and confirming the case that would

exist without them. Let us assume for illustration a prosecution for bribery. Let us assume that there is evidence, direct or circumstantial, that money has been paid to a juror in consideration of his vote. The argument for the petitioner, if accepted, would bring us to a holding that the case for the People must go to the triers of the facts without proof that the vote has been responsive to the bribe. This is paying too high a price for the assurance to a juror of serenity of mind.[5]

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[5] *State* v. *Serpas*, 188 La. 1074 (1938), relied on by the dissenting judge below (R. 2276) and by petitioner Burton (Pet. 13), presented a situation just the converse of that of the *Clark* case. Serpas was charged with wilfully perjuring himself by denying, on *voir dire* examination, that he knew any member of the family of one Goodwin, on trial in a criminal case. In consequence of this denial, and being otherwise qualified, he was accepted as a juror for the Goodwin trial, which resulted in a hung jury, of whom eleven were for conviction, the twelfth refusing to participate in the deliberations. Serpas in fact did know a member of Goodwin's family, but claimed at his perjury trial that he had not known, at the time of Goodwin's trial, that the person he knew was related to Goodwin. To substantiate his claim of lack of wilfulness in denying being acquainted with any member of Goodwin's family, he offered to prove that he was one of the eleven who had voted to convict Goodwin, and not the recalcitrant juror. This offer of proof was rejected by the trial judge, but on appeal the ruling was reversed, largely on the authority of this Court's decision in the *Clark* case.

The *Serpas* decision was, we think, plainly correct, both for the reasons which dictated the result in the *Clark* case, *viz.*, an overriding social policy requiring, in the circumstances, relaxation of the rule that the way in which a juror votes may not be disclosed, and for the equally cogent reason that Serpas, by offering to show how he voted, waived his privilege against disclosure. But the *Serpas* issue, like the *Clark* issue, is manifestly distinct from that presented by the case at bar.

Thus, the *Clark* case is square authority for the propriety of the Government's evidence in this case that the juror LaBranche held out for Burton's acquittal throughout the jury's deliberations, and, indeed, it was because of defense counsel's awareness of the *Clark* holding that no objection was made at the instant trial to that evidence (see R. 546). But it is not authority, as petitioners and the dissenting judge below suppose (see R. 2276), for the further proposition that the defense was entitled to show, on cross-examination of the witness Adams, that jurors *other than LaBranche* also held out for Burton's acquittal. No such issue was before the Court in the *Clark* case. It is true that it appears in the *Clark* opinion (see 289 U.S. at 9; and for the lower courts' opinions in that case, see 61 F. 2d 695, 698; 1 F. Supp. 747, 750) that Mrs. Clark *alone* voted for acquittal, all eleven of the other jurors having been for conviction. But there was no question in the *Clark* case as to the propriety or impropriety of evidence as to how jurors other than Mrs. Clark had voted. It does not even appear by what means the 11-to-1 split among the jurors was ascertained. Moreover, the *Clark* case involved a contempt proceeding before a judge sitting without a jury (unlike the case at bar), and it may be that, because of that fact, rules of evidence were not insisted upon strictly. Consequently, the *Clark* case is not an authority for petitioners' present contention.

Rather, insofar as the *Clark* case is at all controlling on the present issue, it is adverse to petitioners' contention. For the Court in the *Clark* case acknowledged as a *general principle* that the conduct and votes of jurors are properly considered secret matters which may not be divulged, without express consent on the part of each juror involved, *except* when an overriding consideration of public policy (which was found to be present in the peculiar circumstances of that case, so far as the vote of Mrs. Clark was concerned) dictates a relaxation of this rule. But no such consideration is present in the case at bar. The present issue is governed by the general principle recognized in the *Clark* case, rather than by the exception carved out of that principle by that case.

Correctly interpreted, the *Clark* case stands for the twofold proposition that (1) jurors, in general, are privileged not to have their conduct and manner of voting disclosed without their express consent, but that (2), by way of exception, where a certain juror is on trial for his own misconduct in connection with his status as a juror, he may not rely on this privilege. In the instant case, if jurors other than LaBranche had also been on trial for misconduct, it would of course have been proper, under the *Clark* decision, to admit evidence as to how they voted. But, no juror other than LaBranche having been charged with misconduct, the trial judge correctly excluded the

line of questioning, in the cross-examination of Adams, designed to show how other jurors voted. The issue before the jury—so far as is immediately pertinent—was whether the juror LaBranche had been "bought." There was evidence that he had been. Corroborating that evidence was the unchallenged additional evidence that his vote was "responsive to the bribe" (289 U.S. at 14). The manner of voting of no other juror was in issue, the integrity of no other juror having been challenged by the Government. It was quite irrelevant, therefore, to any issue at the trial how any other juror voted. Even if, as is now claimed, the defense could have proved, through cross-examination of the witness Adams, that seven other jurors had also voted for Burton's acquittal, that fact could have had no relevance, because their votes (unlike LaBranche's) were susceptible of no sinister interpretation. The situation here is closely parallel to that discussed in *United States* v. *Manton*, 107 F. 2d 834, 845-846 (C.A. 2) certiorari denied, 309 U.S. 664. It was there pointed out that the fact that the appeals in which Judge Manton participated might in fact have been "rightly decided," and that "the other judges who sat in the various cases" with Manton voted with him, was entirely irrelevant, because Manton's fellow judges "acted honestly and with pure motives," whereas Manton acted "for a price." Here, LaBranche would have been just as guilty

in the eyes of the jury, and rightly so, if the latter believed that seven other jurors voted honestly for Burton's acquittal, while he alone voted dishonestly, as if the jury believed that LaBranche was the only juror who voted for acquittal.

Furthermore, as we have pointed out (*supra*, p. 14), the defense was permitted to establish, in its cross-examination of Adams, that certain of LaBranche's fellow jurors changed their votes during the course of the deliberations. Thus, the jury in the instant case knew that at least at some stage or stages of the deliberations some of LaBranche's co-jurors also favored the acquittal of Burton. Consequently, the jury in the instant case were well aware that the evidence against Burton was not such that only a "bought" juror could possibly have held out for his acquittal. It is not true, therefore, as petitioners contend (Burton Pet 12; and see Cawthorn Pet. 20; LaBranche Pet. 21), that the jury below were "left to conclude" that LaBranche was the only juror in the tax-fraud trial that ever favored Burton's acquittal, and that they thus must inevitably have inferred that LaBranche's vote "must have been motivated by some factor other than the merits—the bribe allegedly paid him." On the contrary, the jury in this case was at no time under the impression that LaBranche and only LaBranche cast his vote for Burton's acquittal.

For the foregoing reasons, we submit, no error, and certainly no reversible error, was committed by

the trial judge in ruling out the attempted line of cross-examination.[6]

2. John Astorias, one of the alleged but unindicted co-conspirators, was a prosecution witness at petitioners' trial. He had previously appeared three times before the grand jury which indicted petitioners, and had also made a statement to Treasury agents. The transcript of his grand jury testimony and of his statement to the Treasury agents covered, in all, some 77 printed pages (see R. 2197). With the object of discrediting Astorias' testimony at the trial by eliciting from him admissions that he had previously given conflicting statements to the grand jury and to the Treasury agents, defense counsel asked leave of court to examine Astorias' earlier statements for cross-examination

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[6] Additionally, it should be pointed out that, assuming—for argument's sake only—that the defense was entitled further to show that jurors other than LaBranche also voted for Burton's acquittal, the mode of proving this fact which the defense attempted was improper. The proper course would have been to call, as defense witnesses, the various jurors who sat in the tax case and to ask each how he voted. Each juror could then have claimed or waived, as he saw fit, his privilege not to disclose his manner of voting. Instead, the defense attempted to establish that other jurors voted for Burton's acquittal by cross-examination of Adams. This was improper for the twofold reason that (1) Adams had no right to waive the personal privilege of each of the other jurors against disclosure of his vote, and (2) this line of interrogation was beyond the scope of the direct examination, and hence improper under familiar principles, since Adams had been asked on direct solely how LaBranche had voted. In short, proof that jurors other than LaBranche had also voted "not guilty," if competent at all (which we deny), was properly a part of the defense's affirmative case, and hence not properly adducible by cross-examination of the government witness Adams.

purposes (R. 687-688, 694-695, 1356). The request was granted, and defense counsel were given all the time they needed to examine Astorias' earlier statements—considerably more time, in fact, than was asked for (R. 1356). On cross-examination, Astorias was confronted with four selected excerpts from the transcripts of his earlier statements, which the defense maintained conflicted with his trial testimony; he readily admitted having made the earlier statements with which he was confronted, and this concluded his cross-examination (R. 696-698). Shortly thereafter, the Government rested its case (R. 703), and Astorias returned to his home in Gulfport, Mississippi.

Near the end of the trial, the defense offered in evidence the entire transcripts of Astorias' prior statements to the grand jury and Treasury agents, as defense exhibits (Burton) 1, 2, 3, and 4 (R. 1347-1348), for the announced purpose of showing "the state of mind of the witness and his motive in testifying, * * * and for the further purpose of impeaching the witness" (R. 1356). As later more fully articulated, the purpose of the offer was "to show that the witness testified as a result of fear, and under duress, hence has an interest and a motive, and is biased" (R. 1797). The Government objected to the offer, and its objection was sustained on the ground that "it is a well settled principle that a witness cannot be discredited or his hostility or bias shown by proving statements made by him outside the Court which do not harmonize

with the statements made by him on the witness stand until his attention has been called specifically to the former statements, with particularity as to time, place and circumstances, so that he can deny or explain them" (R. 1355). Numerous decisions were cited by the trial judge in support of his ruling (R. 1356-1357).

Petitioners now renew their argument, which was unanimously rejected by the Court of Appeals (R. 2197-2198), that it was error to exclude the proffered transcripts (Burton Pet. 15-24; Cawthorn Pet. 22-25; LaBranche Pet. 24-29). The trial court's ruling was, however, in full accord with the well established principle stated in *The Charles Morgan,* 115 U. S. 69, 77, that "contradictory declarations of a witness, whether oral or in writing, made at another time, cannot be used for the purpose of impeachment until the witness has been examined upon the subject, and his attention particularly directed to the circumstances in such a way as to give him full opportunity for explanation or exculpation, if he desires to make it." The ruling likewise accorded with the other decisions cited by the trial judge to the same effect (see R. 1356-1357). See also *Arnstein* v. *United States,* 296 Fed. 946, 950 (C.A. D.C.), certiorari denied, 264 U. S. 595.

Clearly distinguishing the instant case from the decisions cited by petitioners, including those indicating that evidence of bias is admissible without the requirement of laying a foundation (see Burton

Pet. 27; Cawthorn Pet. 25; LaBranche Pet. 27), is the fact that defense counsel were given two hours, though only one was requested, in which to examine Astorias' earlier statements before probing the witness in respect of prior inconsistent statements and bias (R. 1356); yet, as we have indicated, he was questioned in regard to only four selected excerpts from the entire transcripts of his earlier statements.

Petitioners assert that much evidence contained in the excluded documents showed that the prosecutor and the grand jurors accused Astorias of perjury (see Burton Pet. 19; Cawthorn Pet. 24; LaBranche Pet. 28-29), and that the jury should have been allowed to hear this to show Astorias' self-interest and bias in testifying for the Government. However, on his cross-examination, Astorias admitted he had committed perjury (R. 676), so that the jury were fully aware of that fact in weighing the credibility of his testimony. Petitioners also argue that the Court of Appeals was wrong in stating that "there was * * * already in evidence without contradiction all that these lengthy documents would tend to show" (R. 2198) regarding Astorias' fear of prosecution for not having paid his income taxes. They point out that Astorias denied on cross-examination that he feared being indicted for income tax evasion (R. 664, 666), whereas the excluded documents would have shown that he was apprehensive of indictment (see Burton Pet. 20-21;

Cawthorn Pet. 23; LaBranche Pet. 28). But Astorias admitted on cross-examination that he knew the Treasury agents were investigating his affairs (R. 657); that he went before the grand jury about three months after the federal agents learned of the existence of $19,000 in a safety deposit box upon which he had not paid income taxes (R. 662); and that he was "scared [he] was going to be mixed up in something" and that he never mixed up in anything (R. 664). Thus, the jury were thoroughly apprised, from Astorias' own testimony, of his fears arising from his income tax difficulties, and the evidence to that effect contained in the excluded documents could consequently have had no more than cumulative effect.

Petitioners rely upon *United States* v. *Krulewitch*, 145 F. 2d 76 (C.A. 2) (see Burton Pet. 22-23; LaBranche Pet. 27), as conflicting with the Court of Appeals' decision in this respect. However, the situations in the two cases are entirely different. In the *Krulewitch* case, the trial judge, after examining a prior statement given to the F.B.I. by a government witness to ascertain if the statement contradicted the witness' testimony, refused to permit the defendant's counsel to inspect the document and sealed it as part of the record; here, as we have shown, the trial judge gave defense counsel ample time in which to examine the transcripts of Astorias' earlier statements and freely permitted counsel to use the transcripts for cross-

examination purposes. The very basis of the *Krulewitch* holding was that, because of the refusal to permit inspection of the witness' earlier statement, it had been impossible for the defense to lay the proper foundation for the introduction of the statement in evidence in the event the witness denied having made it (145 F. 2d at 79).

3. Petitioners maintain that the trial court's use of the *Allen* instruction (based on *Allen* v. *United States,* 164 U. S. 492, 501), as a supplemental charge, had a coercive effect upon the jury and deprived petitioners of a fair trial (Burton Pet. 24-28; Cawthorn Pet. 21-22; LaBranche Pet. 29-31). The contention is clearly insubstantial.

On Saturday morning, May 15, 1948, the case was submitted to the jury (R. 283, 284). At noon on the following day, the court informed the jury that they had been out 25 hours and was told they could not agree on a verdict (R. 1453-1454). The court thereupon gave the jury a supplemental charge (R. 1454-1455) in the exact language of an instruction approved by the Massachusetts Supreme Court in *Commonwealth* v. *Tuey,* 8 Cush. 1, and by this Court in *Allen* v. *United States,* 164 U. S. 492, 501.[7] Upon completion of this supplemental charge, the court asked if there were any exceptions and counsel for

[7] Petitioner Burton's statement (Burton Pet. 26) that the quoted portion of the instruction was an "additional" instruction, which he proceeds to criticize, is not correct because this was a *verbatim* part of the instruction taken from the *Tuey* case.

petitioners made no objections (R. 1455).[8] It was not until May 18, two days later, at about 11:00 a.m., that the jury returned their verdict (R. 286, 287).[9]

In these circumstances, it seems obvious that the court's supplemental charge did not coerce the jury in arriving at their verdict, not agreed upon until about 48 hours later. If there had been any degree of coercion, the verdict would certainly have been reached much sooner.[10] In any event, since the supplemental charge here given was one expressly approved by this Court in the *Allen* case, it was manifestly proper for the trial court to give it.

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[8] *Brasfield* v. *United States*, 272 U.S. 448, is cited (Cawthorn Pet. 22) for the proposition that the fact that no exceptions were taken to the supplemental instructions does not preclude this Court from correcting a manifest error. The *Brasfield* case, however, was not concerned with any question of supplemental instructions. It held only that it was reversible error for a trial judge to ask a disagreeing jury how they were divided.

[9] Petitioners' statement (Burton Pet. 24; LaBranche Pet. 29-30) that after the giving of the supplemental charge the jury was locked up and held *incommunicado* for 48 hours is incorrect and misleading. On each night the jurors had comfortable rooms in the St. Charles Hotel, and the trial judge was at all times available if the jury had questions.

[10] In *Peterson* v. *United States*, 213 Fed. 920 (C.A. 9), relied on by petitioner Burton (Pet. 27), the supplemental charge was "plainly coercive" in stating that "the government has a right to a verdict without further expenditure of time and money" (213 Fed. at 924) and the jury returned with a verdict in less than an hour (213 Fed. at 926). And in *Edwards* v. *United States*, 7 F. 2d 598, 600 (C.A. 8), relied on by petitioner LaBranche (Pet. 30), the charge contained coercive language not used in the instant case, and the coercive effect was evident from the fact that the jury returned a verdict almost immediately after the giving of the supplemental charge.

Weathers v. *United States*, 126 F. 2d 118, 120 (C.A. 5), certiorari denied, 316 U. S. 681; see also *Hyde* v. *United States*, 225 U. S. 347, 381-383; *United States* v. *King*, 162 F. 2d 594, 596 (C.A. 2).[11]

4. Petitioners contend (Burton Pet. 28-32; Cawthorn Pet. 26; LaBranche Pet. 17-20) that the indictment is duplicitous because it charges that the object of the conspiracy was twofold, *i.e.*, to commit an offense against the United States ("corruptly to endeavor to influence, obstruct and impede and corruptly to influence, obstruct and impede the due administration of justice" in a federal court by bribing a juror, in violation of Section 135 of the Criminal Code, *supra*, p. 3) and "to defraud the United States of and concerning its governmental function of considering and deciding [Burton's guilt in the tax evasion case] through the petit jury * * * free from corruption," etc. Similar contentions have been rejected as often as they have been advanced. It has long been settled that a conspiracy indictment or count of this type, where the objective statutory violation bears an obvious relation to the defrauding of the United States with which it is linked as an object of the conspiracy, is not objectionable for duplicity. *May* v. *United States*, 175 F. 2d 994, 1002 (C.A. D.C.), certiorari

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[11] *Burton* v. *United States*, 196 U.S. 283, cited by petitioners (Burton Pet. 26-27; Cawthorn Pet. 22; LaBranche Pet. 31), did not hold there was any error in giving the *Allen* charge, but that it was error to refuse the defendant's request that the court instruct the jury that those requests to charge which had been allowed were as much a part of the charge as the instructions read by the court as emanating from itself. 196 U.S. at 306.

denied October 10, 1949, Nos. 100-102, this Term; *United States* v. *Manton*, 107 F. 2d 834, 839 (C.A. 2), certiorari denied, 309 U. S. 664. Moreover, "The conspiracy is the crime, and that is one, however diverse its objects." *Frohwerk* v. *United States*, 249 U. S. 204, 209-210; *Braverman* v. *United States*, 317 U. S. 49, 54; *Pinkerton* v. *United States*, 328 U. S. 640, 642-643.[12]

5. Finally, petitioner LaBranche argues that since the indictment charged, and the evidence showed, a conspiracy merely to give and receive

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[12] Petitioners' related contention—that their offense, if any, consisted of violating Section 136 of the Criminal Code, *supra*, p. 4 (the special conspiracy statute dealing with conspiracies to influence jury verdicts) rather than Section 37, *supra*, p. 3 (the general conspiracy statute providing for the punishment of any conspiracy to commit an offense against the United States or to defraud the United States)—is, we think, adequately disposed of by the court below (see R. 2193-2194), which was unanimous on this point. "Section 136 and Section 37 may overlap," as the court below observed (R. 2193), "but neither was intended to repeal or supersede the other." Petitioners, in any event, can scarcely complain of having been prejudiced by being prosecuted under Section 37 rather than Section 136, since the maximum prison sentence imposable under the latter section was thrice the two-year maximum fixed by the former (though a lower maximum fine ($5,000) was fixed by Section 136 than by Section 37 ($10,000)).

There is no conflict, as claimed by petitioners (Burton Pet. 32; Cawthorn Pet. 26), between the decision below and *Enfield* v. *United States*, 261 Fed. 141 (C.A. 8). In the latter case, it was concluded, from the *express language* of Section 4 of the Espionage Act of 1917, 40 Stat. 219 (providing the same penalty for conspiring to violate either § 2 or § 3 of that Act as was fixed by the particular section whose violation was contemplated by the conspiracy, but providing that conspiracies to violate any other section of the Act should be punished under the general conspiracy statute, *i.e.*, Criminal Code, § 37), that "this section [*i.e.*, § 4 of the Espionage Act] was expressly intended to replace section 37 [of the Criminal Code] in those cases to which it is applicable" (261 Fed. at 142).

a bribe and actual commission of the substantive offense, the indictment should have been dismissed as to him (LaBranche Pet. 8-17). The contention is clearly without merit.

The indictment does not charge the substantive offense of giving or receiving bribes nor a conspiracy to give or accept bribes, but rather, in the language of the analogous *Manton* case, 107 F. 2d 834, 839 (C.A. 2), certiorari denied, 309 U.S. 664, "a conspiracy to obstruct justice and defraud the United States, the scheme of resorting to bribery being averred only to be a way of consummating the conspiracy and which, like the use of a gun to effect a conspiracy to murder, is purely ancillary to the substantive offense." Cf. *Glasser* v. *United States,* 315 U.S. 60, 66-67.

The mere fact that the bribery of LaBranche was consummated, as shown by the evidence, did not serve to merge the conspiracy with the accomplished crime of bribery. *Pinkerton* v. *United States,* 328 U.S. 640, 644. A similar contention was squarely rejected in the jury tampering case of *Sneed* v. *United States,* 298 Fed. 911, 913 (C.A. 5), certiorari denied, 265 U.S. 590, which was cited with approval on this point in the *Pinkerton* case.[13]

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[13] In the *Pinkerton* case, the Court stated: "Moreover, it is not material that overt acts charged in the conspiracy counts were also charged and proved as substantive offenses. As stated in *Sneed* v. *United States, supra,* p. 913. 'If the overt act be the offense which was the object of the conspiracy, and is also punished, there is not a double punishment of it.' The agreement to do an unlawful act is even then distinct from the doing of the act."

United States v. *Zeuli*, 137 F. 2d 845 (C.A. 2), cited as being in conflict with the decision below, is clearly distinguishable. The conspiracy there charged was a conspiracy to steal gasoline ration books and convert them, knowing their stolen character. The defendant's conviction was reversed because, though he knew the ration books were stolen, there was no evidence connecting him with the theft. Here, on the other hand, the evidence showed that LaBranche discussed the conspiracy and contemplated bribery with Oliveira even before he was accepted as a juror (R. 559), negotiated with Cawthorn through Oliveira in fixing the amount of the bribe (R. 563), knew that Burton had authorized the bribe and its amount (R. 566), and actually received the bribe money (R. 573). Plainly, LaBranche was intimately connected with, and a member of, the conspiracy from the outset. Also inapposite here is *United States* v. *Dietrich*, 126 Fed. 664 (C. C. D. Neb.), another case relied on by LaBranche (Pet. 11). There the agreement to give and receive the bribe was between two persons only, the giver and the receiver, and this point was the crux of the decision that, this agreement being of the essence of the substantive offense of bribery, it could not be made the basis for a conspiracy charge.[14] Here,

[14] See *United States* v. *Glasser*, 116 F. 2d 690, 696 (C.A. 7), affirmed in part (on this point, 315 U.S. at 67) and reversed in part, 315 U.S. 60, holding the *Dietrich* case not in point as authority for the same contention as is here made by petitioner LaBranche.

however, the conspiracy was to obstruct the administration of justice and defraud the United States of its right to an honest and unbiased jury, and LaBranche was but one member, though a key one, of the conspiracy, which also included, at least, Burton, Cawthorn, Oliveira, and Astorias.

CONCLUSION

The judgment below is correct, and there is no real conflict of decisions. We therefore respectfully submit that the petitions for writs of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
ALEXANDER M. CAMPBELL,
Assistant Attorney General.
ROBERT S. ERDAHL,
PHILIP R. MONAHAN,
ROBERT G. MAYSACK,
Attorneys.

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